

## COUNTY ROADS USE AGREEMENT

**THIS COUNTY ROADS AGREEMENT** (the "Agreement") is made and entered into as of this \_\_\_\_\_ day of \_\_\_\_\_, 2016, by and between Antelope County, Nebraska (hereinafter referred to as the "County"), whose address is 501 Main Street, Neligh, Nebraska 68756, and Upstream Wind Energy, LLC, whose address is c/o Invenenergy LLC, 1 S. Wacker Dr., Suite 1900, Chicago, IL 60606 (hereinafter referred to as the "Developer").

### **WITNESSETH:**

**WHEREAS**, the County is the governmental entity and political concern directed and authorized pursuant to Neb. Rev. Statutes to construct, administer, operate and maintain roadways and highways in Antelope County, Nebraska, more specifically, the roads within the area of Antelope County, Nebraska to be utilized by Developer for the construction of a wind farm facility near Neligh, Nebraska (hereinafter referred to as "Wind Farm Facility");

**WHEREAS**, the term "Developer" shall extend to and include all employees, affiliated companies, authorized agents, visitors, contractors, successors, assigns, or any person under the direction or control of Upstream Wind Energy, LLC;

**WHEREAS**, Developer has developed plans and intentions to construct and operate a Wind Farm Facility in Antelope County, Nebraska utilizing county roadways and highways;

**WHEREAS**, the County has previously consented to the location, development and construction of the Wind Farm Facility within Antelope County pursuant to County zoning regulations through its approval and granting of a conditional use permit to Developer for said purpose;

**WHEREAS**, the County and Developer wish to set forth their understanding and agreement as to the county roadway and highway use issues relating to the construction and operation of the Wind Farm Facility by the Developer in this Agreement.

**NOW THEREFORE**, in consideration of the mutual promises and covenants herein set forth, the parties, intending to be legally bound, agree as follows:

1. Developer and County agree the County roadways/highways utilized by the Developer during the construction of the Wind Farm Facility shall only be those as identified on the map attached as Exhibit A (hereinafter referred to as "impacted roads").

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2. Developer and County agree to the definition of "Road Maintenance" as used herein to mean the grading, reshaping, graveling, surfacing, resurfacing, repair, and/or modification to the roadway/highway surfaces, sub-surfaces, grades, ditches, bridges, culverts or any other drainage fixture(s) on impacted roads. Graveling will use material from a pit location approved by the Antelope County Highway Superintendent, so long as the gravel is available in large enough quantities and at commercially reasonable, competitive rates. If an approved pit location cannot be found meeting this criteria, Developer shall make a good faith effort to locate gravel meeting the Antelope County Highway Superintendent's provided specifications. In no event shall the gravel used on the County Roads not meet sieve requirements as outlined by the Nebraska Department of Roads.
3. Developer shall present to the County its plans for all material Road Maintenance it intends to perform upon roads impacted by the construction of the Wind Farm Facility prior to commencement of construction activities, which County shall have the County Highway Superintendent review, and inspect if necessary prior to approval, within thirty (30) days of receipt, such approval is not to be unreasonably withheld, conditioned or delayed.
4. Developer shall at its expense repair or restore, or cause to be repaired or restored, any damage(s) to roads caused by the construction of the Wind Farm Facility, returning each to their original condition as is reasonable, upon completion of construction of the Wind Farm Facility. These repairs are to include damage specifically caused by construction activities associated with the Wind Farm Facility whether such damage is caused by Developer, its successors or assigns and/or its employees, agents, contractors, subcontractors, material suppliers and/or their respective transport providers. "Damages" shall mean degradation of the road(s) surface, subsurface, culverts, bridges, drainage tiles, drainage facilities and adjacent ditches.
5. Developer and County shall agree as to the condition of impacted roads prior to construction of the Wind Farm Facility. Video recordings and photographs of the current conditions of all impacted roads as designated in Exhibit A, will be undertaken by the Developer, at their expense and provided to the County for their review and retention prior to the start of any construction activities by the Developer. The County shall have the right, if so desired, (i) to observe these recordings/photographs as they are being taken and (ii) to require Developer to undertake certain types of recordings and photographs or additional inspections if County reasonably believes the recordings/photographs are inadequate representations of the impacted roads current conditions.



6. In the event any of the impacted roads degrade (by way of example and not limitation, "degrade" means to show signs of bleeding, rolling, breaking or pumping) while construction of the Wind Farm Facility is ongoing due to construction activities and/or the volume of construction traffic related to the Wind Farm Facility, Developer, at its expense and upon the request of the County, shall implement all necessary means to ensure safe passage of the motoring public within reasonable time; unless immediate hazards exist, in which case Developer shall take immediate commercially reasonable action to make the roadway safe for the motoring public.
7. Developer shall at its expense, upon the request of the County, obtain and post traffic control devices and/or warning signs at various locations as an aid for both construction and public traffic management. All such signage or postings shall comply with Nebraska Department of Roads ("NDOR") rules and regulations.
8. In the event that Developer moves a traffic control device or signage to accommodate its construction traffic, such device or signage shall be promptly replaced by the Developer at its expense.
9. At all times during construction of the Wind Farm Facility, road maintenance work, road improvement work, or repair work as described in paragraphs four (4) and six (6) above, Developer shall ensure that construction areas and routes are free and clear of debris, garbage, obstructions or hazards and excess mud and dirt. Upon request by the County, Developer shall clear any debris, garbage, obstructions or hazards or excess mud or dirt, from a County road, culvert or ditch prior to dusk on the day such request is made.
10. If, during the course of construction of the Wind Farm Facility, the County notifies Developer of significant potholes or other conditions/hazards specifically caused by the construction traffic or construction activities which make travel on the County road hazardous, Developer shall at its expense remediate the hazard, or place adequate warning signs pending the remediation of the hazard prior to dusk on the day it receives notice of the hazardous condition from the County (or promptly if such warning is received after dusk).
11. Developer agrees that any improvement(s) or upgrade(s) to impacted roads and the costs associated therewith are the sole responsibility of the Developer. Developer shall also agree to present to the County Road Superintendent all County road improvement plans prior to construction for his/her review, inspection and approval, which approval shall not be unreasonably withheld, conditioned or delayed and shall

be made within thirty (30) days of County Road Superintendent's receipt of such plans. Developer shall reimburse County for the reasonable costs of such County Road Superintendent review to the extent the County Road Superintendent's review is beyond normal review activities upon receipt of an itemized invoice, such invoice not to exceed \$5,000.00.

12. Developer shall agree that any permanent modification or permanent improvement to impacted roads shall comply with any and all state and local regulations and guidelines, and where applicable, any Federal regulations and guidelines, including signage requirements.
13. Developer shall agree and ensure that any road and intersection closures shall be marked and signed in accordance with NDOR rules and regulations and any applicable requirements.
14. The County reserves the right to request any road improvements remain in place after the completion of construction activities. The County shall be fully responsible and liable for the continued road maintenance of any road improvements it requests to remain in place following the completion of construction of the Wind Farm Facility.
15. Developer shall furnish to the County evidence of liability insurance in the amount of at least Three Million Dollars (\$3,000,000.00) (United States Currency) per occurrence covering the construction, road improvement and/or repair activities of the Developer contemplated by this Agreement. The insurance policy shall provide for a thirty (30) day "prior notice of termination" provision in favor of the County. Should Developer allow such liability insurance to terminate prior to completion of the construction, road improvement and/or repair activities contemplated by this Agreement, the County shall have recourse against the Developer for the reimbursement of funds sufficient to cause the liability insurance to be reinstated until the completion of such construction, road improvements and/or repairs. The County shall be named as additional insured on the policy.
16. Developer shall be responsible for any and all state permits required to haul on public right of ways; provided however, County hereby grants Developer the right to haul on County roads, as described as impacted roads herein and outlined in attached Exhibit A, including loads that exceed posted County weight limits.
17. Developer shall ensure that its contractors, subcontractors, material suppliers and their respective transport providers transporting oversized (overwidth and overweight) loads, use the County roads during daylight hours only and shall display



slow moving vehicle emblems and provide escort vehicles and related signage and lighting as required by federal, state and local highway rules and regulations.

18. Developer shall agree to meet with relevant school district officials to ensure that County roads used by school bus routes are not closed during times students are transported to and from school, or that acceptable alternative routes exist and otherwise to further ensure that reasonably suitable arrangements are put into place for the safe and timely transportation of the local children to and from school.
19. Developer agrees to hold the County, County Supervisors and County Road Superintendent, harmless, indemnify, defend, pay costs of defense (including attorney's fees), and pay any and all claims or judgments which may hereafter accrue against the County and or the County Board, and/or their agents, servants and employees, arising out of any of the use as permitted hereunder of the County roads by Developer, its successors and/or assigns or its employees, agents, contractors, subcontractors and material suppliers and their respective transport providers in connection with the construction of the Wind Farm Facility, or as a result of Developers negligent performance or intentional failure to comply with the terms and obligations set forth in this Agreement.
20. Application of the terms and obligations of this Agreement are limited to the construction of the Wind Farm Facility as detailed in the Conditional Use Permit previously approved and granted to the Developer by the County. In the event the Developer desires the use of County roads for future maintenance work on the Wind Farm Facility, then the Developer shall be responsible for any road damage caused by any such maintenance work. In addition, for future maintenance work after the construction of the Wind Farm Facility is complete, the acquisition of individual permits may be required as needed for overweight or over length loads, which permits will be issued by the County in a timely manner upon the payment of the current permit fee. In the event Developer desires to use the County roads for the development of another Wind Farm Facility or expansion of the completed Wind Farm Facility, another roads agreement with the County shall be required.
21. Due Authorization. Developer hereby represents and warrants that this Agreement has been duly authorized, executed and delivered on behalf of Developer, and that Developer has the power and authority to enter into this Agreement. The County hereby represents and warrants that this Agreement has been duly authorized, executed and delivered on behalf of the County and that the County has the power and authority to enter into this Agreement.

22. Severability. If any provision of this Agreement is held invalid under any applicable law, such invalidity shall not affect any other provision of the Agreement that can be given effect without the invalid provision and, to this end, the provisions hereof are severable.
23. Entire Agreement. This Agreement contains the entire understanding of the parties as to the matters set forth herein, and the Agreement supersedes any prior agreements or understanding by and between the parties.
24. Notices. All notices shall be in writing. Any notice shall be deemed to be sufficiently given: (i) on the date, if delivered in person; (ii) five days after being sent by United States registered or certified mail, postage prepaid, return receipt requested; or (iii) on the next business day if sent by overnight delivery service (i.e. Federal Express) to the notified party at its address set forth above. These addresses shall remain in effect unless another address is substituted by written notice. Notice may be sent via facsimile transmission to a facsimile number; provided, however, that notice sent via facsimile transmission shall be followed by notice delivered by personal service or by registered or certified mail, return receipt requested or by overnight delivery service.
25. Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, with the same effect as if the signatures thereto and hereto were upon the same instrument. Delivery of an executed counterpart of a signature page to this Agreement by telecopier shall be as effective as delivery of a manually signed counterpart to this Agreement.
26. Force Majeure. If performance of the Agreement or any obligation hereunder is prevented or substantially restricted or interfered with by reason of an event of "Force Majeure", the affected party, upon giving notice to the other party, shall be excused from such performance to the extent and for the duration of such prevention, restriction or interference. The effected party shall use its reasonable efforts to avoid or remove such causes of nonperformance and shall continue performance hereunder whenever such causes are removed. "Force Majeure" means fire, earthquake, flood, or other casualty, condemnation, accident, prohibitive or severe weather condition, blizzard or hazardous winter weather conditions, frost ban or similar road restrictions, closing of asphalt production facilities within a commercially reasonable distance of the Wind Farm Facility; strikes or labor disputes; war, civil strife or other violence; any law, order, proclamation, regulation, ordinance, action, demand or requirement of any government agency or utility; or any other act or condition beyond the reasonable control of a party hereto.



27. This Agreement, its terms, obligations and the rights of the parties herein shall be binding upon the successors, executors, administrators and assigns of both the Developer and the County.
28. In the event that any mortgage is entered into by Developer, then the mortgagee shall, for so long as its mortgage is in existence and until the lien thereof has been extinguished, be entitled to the protections set forth in this section. Developer shall send written notice to the County of the name and address of any such mortgagee. A mortgagee of Developer shall have the right: (i) to assign its security interest; (ii) to enforce its lien and acquire Developer's rights set forth herein; (iii) to exercise all of Developer's rights hereunder, and to perform all obligations to be performed by Developer hereunder, or to cause a receiver to be appointed to do so (by way of assuming Developer's rights or substitution without such assumption); and (iv) following exercise of its rights under applicable mortgage, to assign or transfer Developer's rights to a third party. If Developer defaults hereunder, the County shall give notice of Developer's failure to perform to each mortgagee, of which it has notice, concurrently with delivery of such notice to Developer. In the event the County give such notice of failure to perform, the mortgagee shall have the same period after receipt of the notice of failure to perform to remedy the failure to perform, or cause the same to be remedied, as is given to Developer, plus, in each instance, such time reasonably required to complete such cure, including the time required for the mortgagee to perfect its right to cure failure to perform by obtaining possession (including possession by a receiver) or by instituting foreclosure proceedings, provided the mortgagee acts with reasonable and continuous diligence.
29. Each of the parties hereto, their successors and assigns, covenant and agree that in the event of default of any of the terms, provisions or conditions of this Agreement by any party, or their successors or assigns, which default is not cured for a period of seven (7) days (or such longer period of time (i) as is reasonably necessary to cure the same, (ii) as otherwise provided in this Agreement or (iii) as provided by law) after written notice to the defaulting party of such default, the party seeking to enforce said provisions shall then have the right of specific performance, injunctive relief or any other remedy available at law or in equity.
30. This Agreement may be assigned, in whole or in part, or collaterally, without the written consent of the other party.
31. Financial Assurance. Not less than fifteen (15) days after execution of this Agreement, Developer shall provide the County with a bond issued by a sound

financial institution in a form reasonably acceptable to the County in the amount of \$1,000,000. The parties acknowledge that the exact terms of the bond may be subject to terms required by the financial institution issuing such bond. The bond shall provide security to the County for Developer's obligations to the County hereunder. Upon the later of (i) one year after completion of construction of the Wind Farm Facility, or (ii) Developer fulfilling all of its repair obligations set forth hereunder, Developer shall have no further obligation to maintain the bond which shall be cancelled and returned to Developer. In order for the County to draw upon the bond, the County shall be obligated to first submit an invoice to Developer (and Developer's mortgagee, if any) setting forth in detail the time, materials and charges incurred in the repairs necessitating such draw request. Developer may request additional information from the County to the extent such request is reasonable. Once all requested information has been provided to Developer, Developer shall have twenty (20) days thereafter to either dispute such draw request by providing written notice to the County or pay the County the funds requested under the draw. Developer's approval of a draw request within such twenty (20) day period or Developer's failure to provide a dispute notice within such twenty (20) day period shall be deemed a waiver by Developer of its right to contest such draw request. If Developer contests such draw request, Developer's written notice shall contain a detailed explanation of which expenses are disputed and why they are disputed and which expenses are approved. County shall be entitled to draw any non-disputed portion of a draw request. County may not draw any funds from the bond for any expenses that are being disputed until written agreement between the parties or if the parties cannot resolve the dispute within thirty (30) days, the parties shall agree upon a third party Nebraska Licensed Professional Engineer to evaluate the dispute, whose decision shall be binding on the Parties. The cost of said engineer shall come out of the escrow account referenced in this section.

[signature page to follow]



**IN WITNESS WHEREOF**, the parties hereto have executed this Agreement the day and year first written above.

<b>COUNTY:</b>	<b>DEVELOPER:</b>
Antelope County, Nebraska	Upstream Wind Energy LLC
_____ By: Jerald Schwager Chairman, Antelope County Board of Supervisors	_____
ATTEST:	
_____ By: Lisa Payne Antelope County Clerk	